

Volume 11

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

ORACLE AMERICA, INC.,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. C 10-3561 WHA
	)	
GOOGLE, INC.,	)	
	)	
Defendant.	)	
<hr/>		San Francisco, California
		Tuesday, May 24, 2016

**TRANSCRIPT OF PROCEEDINGS**

**APPEARANCES:**

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(Appearances continued on next page)

Reported By: Katherine Powell Sullivan, CSR #5812, RMR, CRR  
Official Reporter - U.S. District Court

**APPEARANCES (CONTINUED) :**

**For Defendant:**

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**BY: BRUCE W. BABER, ESQUIRE**

**Also Present:**

Dew Chung  
System Technology Administrator

Tuesday - May 24, 2016

7:30 a.m.

P R O C E E D I N G S

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(The following proceedings were held in open court,  
outside the presence of the jury:)

**THE COURT:** Welcome.

**MR. VAN NEST:** Good morning, Your Honor.

**MR. BICKS:** Good morning, Your Honor.

**THE COURT:** Be seated, please.

All right. I made a mistake on the time for Google. My  
law clerk failed to read my notes correctly. Google used 873  
minutes, by my clock, leaving 27.

**MR. VAN NEST:** Thank you, Your Honor.

**THE COURT:** What did I give you on --

**MR. VAN NEST:** You gave us 17.

**THE COURT:** I don't know how that happened. So that  
was a mistake.

I think I'm correct on the other side. 883. So 883 would  
be seven minutes left. So the Oracle calculation, I believe,  
was correct. But the -- I made a mistake on the Google side.

All right. What else did you want to take up?

**MR. VAN NEST:** Thank you, Your Honor.

Two things. These are both related to a potential damages  
phase. We have resolved the Dr. Reinhold issue by allowing him  
to testify and asking Your Honor to read this very short

## PROCEEDINGS

1 instruction to jurors related to that. The parties have agreed  
2 to that.

3 (Document handed to the Court.)

4 **THE COURT:** Just a moment.

5 (Pause)

6 **THE COURT:** Fine. Okay. You're in agreement?

7 **MR. BICKS:** Yes.

8 **THE COURT:** All right. We will do that.

9 **MR. VAN NEST:** The other issue, Your Honor, pertains  
10 to trying to simplify a damages phase if we need one.

11 And Google is willing to offer a stipulation limited to  
12 this damages phase, if one occurs, to simplify issues for the  
13 jury.

14 The stipulation would be that if and when Oracle ever  
15 elects a statutory damage remedy, we would agree that the  
16 amount to be paid is the maximum under the statute, which would  
17 be \$150,000 per copyrighted work, for a total of \$300,000.

18 The stipulation would be without prejudice to people  
19 putting on evidence after the damages phase, in a phase three  
20 remedies phase or for attorneys' fees. But the idea of it is  
21 to take out a lot of the clutter that's in the damages phase  
22 now, as a result of this so-called election.

23 By that I mean, we wouldn't have willfulness evidence or  
24 argument in phase two. We would focus on the numbers and the  
25 damages. And Google would be bound, if -- if there is an

## PROCEEDINGS

1 election at any time by Oracle, we agree that they can elect  
2 and they get the full amount, which would obviate the need to  
3 prove willfulness in the damages phase, and greatly simplify  
4 the jury task, and greatly simplify the questions on the form,  
5 and greatly simplify the evidence.

6 **THE COURT:** All right. What does Oracle say to that?

7 **MR. BICKS:** Can I -- Your Honor, can I have an  
8 opportunity to evaluate it? This is the first -- he just  
9 mentioned it to me a couple of seconds ago.

10 **MR. VAN NEST:** I'm not asking for their stipulation,  
11 Your Honor. It would be -- this would be unilateral on  
12 Google's part.

13 I certainly have no problem with Mr. Bicks evaluating it.  
14 And I hadn't mentioned it to him before this morning. But it's  
15 not something I'm asking them to stipulate to. It's something  
16 that we're offering --

17 **THE COURT:** -- a motion that all of those issues be  
18 taken away based on the provisos that you stipulated to.

19 I don't know. This is brand-new to me.

20 So, Mr. Bicks, when you get a chance -- when can you  
21 respond on this?

22 **MR. BICKS:** Can we have until tomorrow morning?

23 **THE COURT:** I think so, yeah. I think so. Because  
24 it's unlikely that we're going to get a verdict today, in my  
25 judgment. But who knows.

## PROCEEDINGS

1           We haven't even taken in the computer cart yet because I  
2           haven't gotten both sides to tell me it's okay. So you should  
3           know that the computer cart is not in there. The two  
4           lawyers -- one lawyer on each side has not yet told us it's  
5           ready to go.

6           **MR. BICKS:** I understand we're working on that, Your  
7           Honor.

8           **MR. VAN NEST:** This is all about loading source code.  
9           This is kind of crazy.

10          **THE COURT:** I don't understand why we're doing that.

11          **MR. VAN NEST:** I don't either.

12          **THE COURT:** We overloaded the system so much that our  
13          computer broke.

14          Why are we putting source code on there? Do we expect the  
15          jury to read source code? I never knew that was going to  
16          happen.

17          Anyway, the computer cart is not in there because I  
18          believe Oracle is responsible for those exhibits having  
19          overloaded our system. And we can't take it in there until  
20          you -- I understand you're working on some fix, separate drive.

21          You're going to make it so complicated that the jury can't  
22          use it.

23          **MR. VAN NEST:** Could we put it in there now, without  
24          that on there, and just get it so they have it to start?

25          **THE COURT:** I'm not going to put it in there unless

## PROCEEDINGS

1 both sides agree. I would be willing to bring the jury out  
2 here and explain what's going on. But I'm not willing to send  
3 in stuff that is not agreed to.

4 **MR. VAN NEST:** In other words, my point is, I don't  
5 see any way in the world the jurors are going to read source  
6 code. And our paralegals were here until all hours yesterday  
7 while they were trying to load it. It doesn't make any sense.

8 **MR. BICKS:** Your Honor, I confess what I'm about to  
9 say, I'm not an expert on this, but I gather it's been solved.  
10 And here's a hard drive that just needs to be plugged in. And  
11 I think Ms. O'Meara told me we solved the problem; I gather,  
12 coordinated with them.

13 **THE COURT:** Is that agreed to?

14 **MR. VAN NEST:** That's fine with us.

15 **THE COURT:** All right. So if I just send that thing  
16 into the --

17 **MR. BICKS:** I think so, yeah.

18 **THE COURT:** So the jury is going to know how to use  
19 it? Is there an index anywhere of what's on the drives, for  
20 the jury to look at?

21 **MR. BICKS:** I believe so.

22 **THE COURT:** You know or you believe?

23 **MR. BICKS:** Well, let me check.

24 **THE COURT:** I'm okay with this. But I want you to  
25 understand that the jury right now could come back with a

## PROCEEDINGS

1 verdict. They don't have to look at a thing.

2 **MR. BICKS:** Right.

3 **THE COURT:** And if they come back with a verdict  
4 against one of you two, you cannot try to set it aside on the  
5 ground that the computer cart wasn't in there yet. They have  
6 the right to say, "We're ready to go. We don't need any  
7 computer. We don't need to see anything more. Here's our  
8 decision."

9 They're a statutory body. That's their right, even though  
10 most juries would want to see everything or at least possibly  
11 see everything and discuss it.

12 But I'm a little irritated that you lawyers are dragging  
13 this out. So --

14 **MR. VAN NEST:** We're perfectly -- we agreed to it day  
15 one. I don't see a reason for it, but we agreed to it. They  
16 just haven't been able to load it.

17 **THE COURT:** Hand the thing you both have agreed to, to  
18 the clerk. And then one of you describe it on the record what  
19 it is you're handing to her.

20 **MR. BICKS:** Yes. It's marked, Your Honor, as Trial  
21 Exhibit -- it's 9106 to 9111. And it's a hard drive with a --

22 **THE COURT:** All right. We will send it into the jury  
23 room with the cart.

24 Dawn, is the cart -- do both sides agree the cart is ready  
25 to go in?



1           **MR. VAN NEST:** Yes.

2           **MR. BICKS:** Yes.

3           **THE COURT:** Okay. So, Dawn, you can take it in with  
4 that. You don't need to say a thing. Just say, "Here's the  
5 cart and a hard drive," and let them figure it out. But don't  
6 do that until we have finished up here.

7           So, okay. How else can I help the lawyers?

8           **MR. BICKS:** Could I just ask a question, Your Honor,  
9 for your thoughts, as we're thinking about the opening for the  
10 damages phase, the thoughts on the role that Dr. Kearl is going  
11 to play and whether or not he's someone we should be addressing  
12 in our opening.

13          **THE COURT:** It's up to you.

14          My plan is for the two sides to present their experts,  
15 then Dr. Kearl to be presented by attorney Cooper. And then  
16 you all get to cross-examine him, and possibly even bring your  
17 own experts back to rebut him. That could even be possible.

18          So if you want to address him in your openings, that's  
19 fine.

20          **MR. BICKS:** Okay. Thank you.

21          **MR. VAN NEST:** Your Honor, related to that, I think  
22 Your Honor is going to receive a letter this morning from  
23 Mr. Cooper, that we've all agreed to.

24          He's asked -- he's asking for not 24-hour notice, but  
25 next-day notice on starting a damages phase. What he's saying

## PROCEEDINGS

1 is, if a verdict comes in on a Tuesday, then I'd like to have  
2 at least the knowledge that we won't start the damages phase  
3 until Wednesday, the next morning. If it comes in on  
4 Wednesday, we won't start until Thursday.

5 We're fine with that. That's what he's asking. And he's  
6 going to send a letter in to Your Honor today, I think, along  
7 those lines, that the parties --

8 **THE COURT:** So if we got a verdict at 9:00 a.m., he  
9 wants us to waste the rest of the day?

10 **MR. VAN NEST:** That's what he's suggesting, to get  
11 Dr. Kearl --

12 **THE COURT:** I'm not sure I will agree to that.

13 Fine. He can send the letter. Maybe we'll agree with  
14 that.

15 **MR. VAN NEST:** It's up to Your Honor.

16 I wanted you to know we're fine with it, both sides. And  
17 we expect it to come in.

18 Can I have just a moment with counsel?

19 **THE COURT:** Uh-huh.

20 (Pause)

21 **MR. VAN NEST:** I don't think we have anything else,  
22 Your Honor.

23 **THE COURT:** All right. Dawn, can you go ahead and  
24 take that cart and the -- what is that thing called, the hard  
25 drive.

## PROCEEDINGS

1           **THE CLERK:** Right. I also have the physical exhibits.  
2       So all of it will be going in now.

3           **THE COURT:** So the physical exhibits aren't in there  
4       yet either?

5           **THE CLERK:** No, because I wanted to make sure all the  
6       sleeves were in with the thumb drives.

7           **THE COURT:** Have the lawyers vetted it?

8           **MR. VAN NEST:** Yes.

9           **THE COURT:** Both sides have vetted the exhibits?

10          **MR. VAN NEST:** Yes.

11          **THE COURT:** All right.

12          **MR. VAN NEST:** Thank you, Your Honor.

13          **THE COURT:** Have the instructions gone in, and the  
14       verdict form?

15          **THE CLERK:** Yes.

16          **THE COURT:** Okay.

17          **MR. VAN NEST:** Thank you.

18          **THE COURT:** I guess that's it. Right?

19          **MR. VAN NEST:** That's it.

20          **THE COURT:** Okay.

21          **MR. BICKS:** Thank you.

22               (Proceedings in recess during jury deliberations. 7:41 to  
23       11:06 a.m.)

24               (The following proceedings were held in open court,  
25       outside the presence of the jury:)

## PROCEEDINGS

1           **THE COURT:** Let's come to order now.

2           Here is the problem: The clerk took the computer, court  
3 electronic computer system, into the jury room. And the  
4 foreperson eventually replied that it didn't work.

5           What did they say? What was the exact words, as best you  
6 can recall?

7           **THE CLERK:** They asked the CSO to come out and get me.

8           I went to the door. They advised me that they were unable  
9 to open whatever the documents were that have supposedly been  
10 placed on the PC.

11          **THE COURT:** On the PC or on the --

12          **THE CLERK:** It's a jury PC, is how we refer to it.

13          **THE COURT:** So they could not open any of it?

14          **THE CLERK:** Just specific files. The source code  
15 files. 9100 through --

16          **THE COURT:** Those are the ones that they could or  
17 could not open?

18          **THE CLERK:** They could not open those specific ones.

19          The others, apparently, I don't know. I didn't ask about  
20 opening any other ones. But those were the ones specifically  
21 they could not open.

22          They did not tell me they tried all of them. They just  
23 said "source code."

24          **MR. BABER:** Your Honor.

25          **THE COURT:** Yes.

## PROCEEDINGS

1           **MR. BABER:** I thought Oracle said this morning the  
2 9100s were the ones on the external drive, not the ones on the  
3 computer itself.

4           **MS. O'MEARA:** There are some on both.

5           **MR. BABER:** The 9100s?

6           (Counsel conferring out of hearing of the court reporter.)

7           **THE COURT:** You better come up here. The court  
8 reporter won't be able to hear you.

9           **MR. BABER:** I don't know, Your Honor, because I  
10 haven't been involved in any of this loading.

11           But from what I understood this morning, what Oracle said,  
12 I thought, was that 623, which I think is the whole big source  
13 code platform work, is on the computer; but they had moved to  
14 the external drive the 9100 series.

15           **THE CLERK:** Partial.

16           **MR. BABER:** Partial. Then I'm --

17           **THE CLERK:** 9106 through 9111 is on the hard drive.

18           **MR. BABER:** Those are the ones the jury can't open?

19           **THE CLERK:** I don't know specifically. Just they  
20 won't open.

21           **THE COURT:** It's not like an interrogation where we  
22 quiz them on exactly what happened.

23           All right. So, anyway, so you heard what the clerk -- so  
24 then the clerk called up our IT guy, Dew Chung.

25           So tell us, can you tell us what you think the problem is?

## PROCEEDINGS

1 Get over here close enough so that they can hear you and the  
2 court reporter can take down what you say.

3 **MR. CHUNG:** I'm not sure what the jury is supposed to  
4 do with these files. It's just a bunch of source code. So  
5 they're not videos or audio files.

6 I'm not sure --

7 **THE COURT:** Okay. That's a different question. We'll  
8 come to that in a minute.

9 I thought there was supposed to be a video file. I didn't  
10 know it was source code files. Be that as it may, are you able  
11 to open the source code files?

12 **MR. CHUNG:** They're just program files. So you can  
13 look at the files, but you just can't do anything with them.

14 **THE COURT:** Wait a minute. The clerk told me that you  
15 couldn't even open them and that you needed some kind of  
16 special program, which is not on there, in order to access  
17 them.

18 So that's not correct? Or is that correct?

19 **MR. CHUNG:** It's just the system files.

20 **THE COURT:** What?

21 **MR. CHUNG:** I'm not sure why it's on the computer in  
22 the first place.

23 **THE COURT:** Because the case has something to do with  
24 source code. Maybe the jury wants to look at it. I don't  
25 know. The lawyers put it into evidence.

## PROCEEDINGS

1           **MR. CHUNG:** Let's --

2           **THE COURT:** Are you able to access the source code?

3           **MR. CHUNG:** You can open and look at the file -- I  
4 mean, you can browse through the files.

5           **MR. BABER:** That's what they're supposed to be able to  
6 do, is open the file and see the source code, and scroll down  
7 through it if they want to.

8           **MR. CHUNG:** You can browse through the folders, but  
9 that's about all. I mean --

10          **MR. BABER:** And there are also supposed to be a couple  
11 of short videos.

12          **THE COURT:** We've got you right here. Show us some of  
13 the source code. We've got the machine here. Let's see if you  
14 can make it work.

15          **MR. CHUNG:** They can browse through the folders.

16          **MR. BABER:** 623.

17          (Counsel confer with the court's System Technology  
18 Administrator Dew Chung.)

19          **THE COURT:** The court reporter will not take down all  
20 you over there mumbling with each other. She can't hear.

21          (Counsel confer with the court's System Technology  
22 Administrator Dew Chung.)

23          **THE COURT:** You have to remember this is going to the  
24 Court of Appeals.

25          **MR. CHUNG:** Sure.

## PROCEEDINGS

1           **THE COURT:** This court reporter has to take down your  
2 words, Dew. So say it clearly now. What's the problem?

3           **MR. CHUNG:** The problem is the files are hidden within  
4 a lot of folders. And they need a reader to read these code.  
5 So we have to associate the reader to these code, which we just  
6 did.

7           **THE COURT:** Is that easy or hard?

8           **MR. CHUNG:** It's easy as long as they can browse  
9 through the files.

10          **THE COURT:** Well, how come -- if it's so easy, how  
11 come they couldn't do it?

12          **MR. CHUNG:** Well, it's very hidden in a structure of  
13 folders. So they have to browse to the files and navigate  
14 through the folders.

15          **MR. BABER:** If I could just explain a little bit, Your  
16 Honor.

17          Okay. And you do it, because I don't want to touch it;  
18 right. Just click on this one.

19          There is one folder. You open it up on the desktop or on  
20 the drive. There's a folder which says "623"; right. 623 is  
21 the big exhibit with all the source code for the whole Java  
22 platform.

23          When you open it up, there's a folder. You open that up,  
24 there's another folder. You open that up, there's four more  
25 folders. And they've got to pick the right one.



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1           So then you pick the one you want. And then there's 12  
2 more folders. You keep on going, folder to folder to folder to  
3 folder, to find the specific file of source code. At least in  
4 this exhibit.

5           **THE COURT:** That's not the way it normally works. The  
6 way it normally works, in a simpler case, is they can click on  
7 the videotape of the claimant playing tennis instead of being  
8 in a wheelchair.

9           **MR. BABER:** I think the videotapes are -- go back out  
10 to the main menu of the drive listing. Just click on one of  
11 the videos and see if the video comes up. You can see the  
12 video clip. Those work fine.

13           (Video playing)

14           **THE COURT:** So those work as they should?

15           **MR. BABER:** I'm sorry, Your Honor?

16           **THE COURT:** The video work, the one you just clicked  
17 on, worked as it should?

18           **MR. BABER:** Exactly.

19           **THE COURT:** So which is the one that's the problem?

20           **MR. BABER:** Well, it looks like in this index there's  
21 four videos, one Excel spreadsheet, and then seven folders that  
22 presumably have source code in them.

23           **THE COURT:** The same problem for all seven folders?

24           **MR. BABER:** Click on one of these 9100, please.

25           Okay. That one we opened, you have 2, 4, 6, 8, 10, 12,

## PROCEEDINGS

1 14, 16, 18, 20 -- 20 or so folders and another file of some  
2 unknown type. I can't even tell you what it is. So if I  
3 wanted to look at a source code file that's in here, I would  
4 have to just start opening folders to see where it might be.

5 **THE COURT:** All right. We have two choices here. We  
6 can -- assuming we're going to send this into the jury room at  
7 all, we can send in detailed instructions so that they can get  
8 at the source code. You lawyers would have to agree on that  
9 step by step. Type it up, and we'll send that in.

10 I suppose, alternatively, we could have the jury come back  
11 out and Dew could do a demonstration of how to do it. I think  
12 that's a little irregular there, in the middle of their  
13 deliberations now, if we bring them out to give them a tutorial  
14 on how to work our equipment when it's our own fault.

15 You lawyers should not have done this to the jury. You  
16 should have tested it out yourselves, to see what the problems  
17 were.

18 Or we can just say to the jury forget everything that's on  
19 the machine, we give up.

20 **MR. BABER:** The videos are on there, too, Your Honor.

21 **THE COURT:** I know you've got videos on there.

22 You all have sabotaged the system so bad that I don't know  
23 what to do.

24 Let me hear from the lawyers. What are your solutions?

25 **MS. ANDERSON:** Your Honor, for Google, the source code

## PROCEEDINGS

1 aren't files that we put in evidence. These are materials that  
2 Oracle moved in on Monday morning.

3 We're perfectly fine if the Court prefers that this not go  
4 to the jury because of the complications of it. But, you know,  
5 we weren't the ones who moved that in evidence.

6 **THE COURT:** I'm sorry, you were or you weren't?

7 **MS. ANDERSON:** Google did not move in those huge  
8 source code files. These were things Oracle moved in Monday  
9 morning.

10 **MR. MOSS:** They were part of a stipulation, Your  
11 Honor. ECF 1901. So the parties agreed this would be part of  
12 the record. And we can give instructions --

13 **THE COURT:** You know what you can do? You can go  
14 print it out. That would be part of the record. You can print  
15 out 15 million lines of code. You have no absolute right to  
16 put it on the court and overload the court system like that.

17 **MR. MOSS:** I understand, Your Honor.

18 We can give the jury direct and specific instructions on  
19 how to access the particular files at issue in this case; make  
20 it easy for the jury.

21 **THE COURT:** You can write that out?

22 **MR. MOSS:** Absolutely, Your Honor.

23 **THE COURT:** The instructions need to say that the  
24 source code is complicated. Here are the steps, A, B, C, D.  
25 And then for the videos it's simple; just click on the icon. I

## PROCEEDINGS

1 think something like that ought to be said.

2 All right. Let me hear -- here's what I think should be  
3 done. Let me make sure the Google side hears me.

4 We write out clear-cut instructions for the source code  
5 and then everything else. And then we send that back into the  
6 jury room. All right.

7 Does that work?

8 **MS. ANDERSON:** We'll work on some language, Your  
9 Honor. We can work on some language together.

10 **MR. MOSS:** That will work.

11 **THE COURT:** You need to get going on it because what  
12 if they come back with a verdict? And somebody is going to  
13 say, "Well, they didn't look at my video."

14 **MR. MOSS:** We'll get to work right now.

15 **MS. ANDERSON:** We'll do it right now.

16 **THE COURT:** Both sides are at fault here for not  
17 having made the system -- in fact, I told you at the final  
18 pretrial conference you had to pay attention to this computer  
19 problem.

20 Okay. I'm going to let you go work on the problem. And  
21 please let Dawn know when you have some language. And then we  
22 will reconvene.

23 Please stay handy. Don't go too far.

24 **MR. MOSS:** Thank you, Your Honor.

25 **MS. ANDERSON:** We'll be right here, Your Honor.

## PROCEEDINGS

1 Thanks.

2 (Proceedings in recess from 11:22 a.m. to 12:12 p.m.)

3 (The following proceedings were held in open court,  
4 outside the presence of the jury:)

5 **THE COURT:** Be seated, please.

6 So let's first deal with the computer. Do we have it  
7 ready to go into the jury room with instructions that both  
8 sides agree to?

9 **MS. ANDERSON:** Yes, Your Honor.

10 So the parties worked out some instructions for the  
11 computer. But one thing we did observe, in working this out  
12 together, is that Exhibit 4108 is on the computer but should  
13 not be. The official copy is a printed copy that we understand  
14 is in the jury room.

15 And so I think both parties agree 4108 should come off the  
16 computer.

17 **THE COURT:** How do you do that? I don't know how to  
18 make it come off.

19 **MR. MOSS:** We can just delete it, Your Honor. From a  
20 technological, it's easy to do. And the parties agree we can  
21 just delete it.

22 **THE COURT:** Both sides agree?

23 **MS. ANDERSON:** Yes, with the assistance of the Court's  
24 technology person.

25 **THE COURT:** Dew, give them a hand and delete that

## PROCEEDINGS

1 exhibit.

2 **MR. MOSS:** Thank you, Your Honor.

3 **MS. ANDERSON:** We are printing a copy of the  
4 instructions the parties thought would be acceptable.

5 Would you like us to read it to you?

6 **THE COURT:** You shouldn't have your name on it.

7 **MS. ANDERSON:** We're printing a blank one for you.  
8 Printing a clean, blank one for you, Your Honor.

9 **MR. MOSS:** And 4108 is now removed from the computer.

10 **THE COURT:** I think it works. I mean, I take your  
11 word that it works.

12 **MS. ANDERSON:** Thank you, Your Honor.

13 **MR. MOSS:** Your Honor, the source code file should  
14 open in a form the jurors understand.

15 **THE COURT:** Look over there and see.

16 Dew, did you take that exhibit off?

17 **MS. ANDERSON:** Not yet.

18 **MR. CHUNG:** Yes, Judge. I removed that.

19 **MS. ANDERSON:** Oh, it's --

20 **MR. MOSS:** Yeah.

21 **MS. ANDERSON:** And out of the deleted folders as well?

22 **MR. CHUNG:** Yes, I emptied the recycling bin.

23 **MS. ANDERSON:** Thank you so much.

24 **MR. CHUNG:** You're welcome.

25 **MR. MOSS:** Appreciate it.

## PROCEEDINGS

1           **THE COURT:** Have you read these instructions?

2           **MR. CHUNG:** No, I haven't.

3           **THE COURT:** Read them real quickly and tell me if you  
4 think they're going to work.

5           Meanwhile, have the lawyers looked at this other note from  
6 the jury?

7           **MR. BICKS:** Yes, I have, Your Honor.

8           **THE COURT:** I'll read it out loud.

9           Ms. Yasumoto, who is our lawyer and also our foreperson,  
10 asked the following question:

11           "Can jurors take their handwritten notes, notepads,  
12 home with them each night?"

13           I think the answer should be yes.

14           **MR. BICKS:** Right. We had talked about that with the  
15 Court before.

16           **THE COURT:** Any objection?

17           **MS. ANDERSON:** Your Honor --

18           **MR. BICKS:** No.

19           **MS. ANDERSON:** -- Google objects. We think the jurors  
20 should deliberate together and consider these issues together.  
21 So we would object to --

22           **THE COURT:** That's not deliberating. Just reading  
23 your own notes is not deliberating.

24           **MS. ANDERSON:** Well, they are now in the deliberation  
25 phase. And their consideration of the issues, in our view,

## PROCEEDINGS

1 should be done together as a group, as a full jury.

2 So our proposal is the answer to those questions should be  
3 "No."

4 **THE COURT:** So you're saying that when they come to  
5 court each morning and are waiting for everyone to show up,  
6 they can't even look at their own notes?

7 **MS. ANDERSON:** Well, I don't think that was one of  
8 their questions.

9 **THE COURT:** It wasn't one of their questions, but if  
10 you're not going to let them read their notes at home, why  
11 would you let them read their notes before they start in the  
12 mornings?

13 **MS. ANDERSON:** Well, if they pose that question, Your  
14 Honor, I think we will, of course, consider it. But the  
15 questions they've posed now are questions that really raise  
16 questions of deliberations. And they should be considering  
17 these issues and discussing them and evaluating them together  
18 as a jury.

19 **THE COURT:** Do you have authority for your position?

20 **MS. ANDERSON:** Not off the top of my head, Your Honor.  
21 I would be happy to look for that.

22 **THE COURT:** Let me give you the second question.

23 "Can the jurors review trial exhibits on their own if  
24 they arrive early or want to stay late?"

25 **MS. ANDERSON:** Our view, Your Honor, is the same as to



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1 all of the three questions posed. The answer should be no to  
2 these jurors, to assure that they deliberate together.

3 **THE COURT:** All right.

4 What's your view, Mr. Bicks?

5 **MR. BICKS:** I think on 2, I think we would have a  
6 similar view to that, Your Honor.

7 I just thought on the notes, we had already discussed that  
8 with the Court and the jury. And we said that they could take  
9 their notes home with them. And we had already -- we had  
10 already discussed that issue.

11 The Court had already told them they could take them home  
12 over the weekend. And so I thought on 1 we would stick with  
13 what we talked about.

14 On 2, I think we did agree that when it comes to the  
15 exhibits they should be deliberating together.

16 **THE COURT:** All right. We'll come back to that one.

17 **MR. BICKS:** Yep.

18 **THE COURT:** Number 3: Take the jury instructions home  
19 with them each night?

20 **MS. ANDERSON:** And, again, Your Honor, we think they  
21 should deliberate together. So our proposal is they should be  
22 told "no," to assure they deliberate together.

23 **MR. BICKS:** And I think we would agree with that.

24 **THE COURT:** Well, all right. I want to come back to  
25 this for a second.

## PROCEEDINGS

1           So you two both said "no" on numbers 2 and 3. And then on  
2 the handwritten notes you say they should not -- you say,  
3 Google, don't take them home at night.

4           And, you know, it's not even evidence. It's just their  
5 own handwritten notes.

6           **MS. ANDERSON:** Understand, Your Honor. However, they  
7 are now in the phase of the case where they are deliberating  
8 the questions of the case. They should do it together.

9           And having the notes at home with them may invite them to  
10 engage in the deliberation process separately from their fellow  
11 jurors.

12           **THE COURT:** No, no. I mean, that would be wrong. I  
13 would tell them not to do that. I have told them not to do  
14 that.

15           What they would do is read their notes silently at home so  
16 that they can better understand what the evidence was. They  
17 wouldn't be deliberating with anyone else.

18           **MS. ANDERSON:** Well, it --

19           **THE COURT:** What if they think about the case while  
20 they're driving home? They think about it. Are you going to  
21 prevent them from doing that?

22           **MS. ANDERSON:** Of course not, Your Honor.

23           **THE COURT:** I'm very suspicious. You must think  
24 you're going to lose this case.

25           **MS. ANDERSON:** No, Your Honor.

## PROCEEDINGS

1           **THE COURT:** Really, I think this is shocking.

2           **MS. ANDERSON:** Well, Your Honor, we think it's very  
3 important. And this principle of jurors deliberating together  
4 is a very important one.

5           **THE COURT:** I'm going to give you an example with a  
6 different jury in another case that had a lot of documents.  
7 One day, I eventually learned, the jury devoted the entire day  
8 to silently everyone got a chance to read any document they  
9 wanted. They didn't talk about the documents. They --  
10 somebody said, Give me Exhibit 31. Give me Exhibit 5320.

11           So each of them got to read whatever they wanted. And  
12 then later, the next day, they would bring up whatever they  
13 thought was important. But they didn't talk about each one  
14 that they read. They each got to read whatever they wanted to  
15 read from the exhibits.

16           Now, under your view of what deliberations are, that would  
17 be bogus. They couldn't do that.

18           **MS. ANDERSON:** Your Honor, I think both parties agree  
19 here that, for example, bringing home the jury instructions  
20 would not be a good idea, given the deliberative process. And  
21 I don't see any meaningful distinction between preventing the  
22 jury from doing that and preventing them from bringing home  
23 their notes.

24           Because the principle at issue here is when they are  
25 deliberating in their mind how they want to come out in this

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1 case, they should be doing it together. And I think that  
2 having detailed notes at home, that they're going over outside  
3 of the presence of their fellow jurors, invites separate  
4 deliberations. And that's our concern.

5 **THE COURT:** Well, I can tell them not to deliberate  
6 with anyone else. They know that.

7 This is one of the best juries in the history of our  
8 courthouse. They've been here early. They're not going to  
9 deliberate with somebody else. That is a fallacious argument.

10 What you don't want them to be able to do is read their  
11 notes, go back through their notes.

12 **MS. ANDERSON:** That's not the issue, Your Honor.

13 And the point of having jurors deliberate together is so  
14 they have the benefit of each other's views as they come to a  
15 conclusion as a jury. And going over it alone in detail, which  
16 is what those notes will invite, encourages the potential for a  
17 problem with the deliberative process. That's our concern.

18 It's the same reason why Oracle doesn't want to have them  
19 bring home the legal instructions. It's the same principle.

20 **MR. BICKS:** Well, just to be clear, I'm just trying to  
21 be consistent and fair.

22 We discussed the notes already with the Court. And we  
23 said it was okay for the jurors to have their notes and to look  
24 at them. And yesterday the jury -- they started their  
25 deliberations yesterday; right? So what happened last night?

## PROCEEDINGS

1       We told them they could take their notes home. And that's  
2       what everybody said. Seemed to be a common sense idea, what  
3       happened during the case. And now we're changing the rules.  
4       And I don't see that it makes a lot of sense to do that.

5               **THE COURT:** Okay. I want to say something about this.

6       The lawyers must remember that the jury is a statutory  
7       body. And they -- it's not just some handpicked dream team  
8       that you lawyers get to work on.

9       They have a statutory duty to decide the case. And  
10      however they want to do it, as long as they don't get  
11      extraneous information, and they come to a unanimous verdict,  
12      that's their -- they don't have to deliberate at all. They  
13      could go in there and say, "Everyone is going to read the  
14      documents for the next three days, and then we'll vote." And  
15      if they all vote the same way, they don't have to say a word to  
16      each other.

17      It's up to the jury to decide how they deliberate. It's  
18      true, judges give them guidance; try to tell them not to be a  
19      holdout, so forth; listen to the other jurors. Of course, we  
20      say all of those things.

21      But the jury is a statutory body that has the right to  
22      decide how it's going to -- they could go in there and not  
23      deliberate at all, and say, "Let's take a straw vote. And then  
24      everyone who's for Oracle raise your hand or not raise your  
25      hand." And let's say it happens to be unanimous right off the

## PROCEEDINGS

1 bat. That's as good a verdict as if they deliberate for three  
2 weeks. It's as good a verdict. It's up to them how they want  
3 to go about doing their job.

4 So for us now to -- it's true, they're being courteous in  
5 asking us. But I feel, as a judge, a responsibility to respect  
6 the role of the jury and not hamstringing them just because the  
7 lawyers both agree that we should.

8 So here's what I want to do: I'm going to tell them, For  
9 the time being, don't do any of these things because the  
10 lawyers can't agree or the -- I don't know if I'll tell them  
11 that. I'm just going to say, Don't do any of these things, and  
12 I'll give you an answer in the morning.

13 But overnight you have to brief this. And the fact that  
14 you two agree on number 2 and 3 does not matter, because I feel  
15 a duty to protect the integrity of the jury process.

16 So you need to come up with some case law.

17 **MR. BICKS:** Can I just ask the Court, I mean, have you  
18 seen in your experience that they take jury instructions home?  
19 I just honestly haven't seen that before.

20 **THE COURT:** I don't think anyone has ever asked. I  
21 assume they have. Why shouldn't they? We give them to them to  
22 look at.

23 What is the harm in letting them read jury instructions at  
24 home so they can better understand them?

25 If it really would lead to them talking it out with some

## PROCEEDINGS

1 member of the family, I accept that. That would be a problem.  
2 But this jury will not do that. And you always have that risk.  
3 And you tell them not to do it. I believe they will honor  
4 that.

5 **MR. BICKS:** I mean, that would be -- when you  
6 mentioned it, because I have never seen this, that would be my  
7 instinct of concern, if you take the jury instructions home,  
8 you know, the natural instinct is you want to talk to people  
9 about it. But I hear what you're saying.

10 **THE COURT:** Anyway, by midnight tonight you have to  
11 file your briefs. Because I'm on the verge of telling them  
12 they can do all three of these things. The fact that you  
13 stipulate doesn't mean I'm not going to do it.

14 For the moment, I'm going to say -- do we have copies of  
15 this?

16 **THE CLERK:** Yes. The parties have been given copies.

17 **THE COURT:** I'm going to write the following out:

18 "Please don't do this yet. I'll advise tomorrow."

19 How that's that?

20 **MS. ANDERSON:** That's fine. Thank you, Your Honor.

21 **THE COURT:** Is that fine with you, Mr. Bicks?

22 **MR. BICKS:** Yes.

23 **THE COURT:** "Please do not do this yet. I will advise  
24 tomorrow."

25 Dawn, can you show this to counsel. What is today? Show

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1 this to counsel and let them approve that. And then I will  
2 have you take that in.

3 (Counsel confer off the record.)

4 **MR. BICKS:** Looks good.

5 **MS. ANDERSON:** Looks good. Thank you, Your Honor.

6 **THE COURT:** All right. So, now, let's go back to the  
7 computer.

8 Is it ready to go in?

9 **MS. ANDERSON:** Do we have the --

10 **MR. PAIGE:** It's being revised, Your Honor. A couple  
11 of typos to take care of.

12 **MR. MOSS:** The computer is ready.

13 **MS. ANDERSON:** The computer is ready.

14 **THE COURT:** Dew, did you think the instructions are  
15 clear enough?

16 **MR. CHUNG:** These instructions should be able to help  
17 the jurors to navigate and access the source code. So these  
18 instructions looks fine to me.

19 **THE COURT:** Looks fine to you?

20 **MR. CHUNG:** Yeah.

21 **THE COURT:** Okay. Thank you. Then let's -- where is  
22 your final copy?

23 **MR. MOSS:** I believe it's printing, Your Honor.

24 **THE COURT:** I don't see the printer.

25 **MR. PAIGE:** We put it downstairs, Your Honor.



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1           **THE COURT:** Okay. Well, I would like to wind this up.  
2 I don't want to leave it hanging. So I want to sit right here  
3 until we get the computer part working.

4           Why don't we just cut and paste with the scissors? Use  
5 the one you gave me. I could just snip it right now, and we'll  
6 go copy it. Put a handwritten change in there.

7           Ms. Simpson is looking like it would be sinful to do that.

8           What's wrong with that, Ms. Simpson?

9           **MS. SIMPSON:** Industrious idea.

10          **MR. RAGLAND:** The problem is, it takes two elevators  
11 to get where the printer is.

12          **MS. ANDERSON:** If we had a Sharpie, I could --

13          **THE CLERK:** I can cut and paste it. I can reprint it  
14 from the email. I will just go ahead and cut and paste and put  
15 it onto Word --

16          **MS. ANDERSON:** That's the thing that had --

17          (Pause)

18          **THE CLERK:** Okay. You've got a copy.

19          **MS. ANDERSON:** I've got the --

20          **THE CLERK:** The numbers. Okay. Here, I have the  
21 document.

22          **THE COURT:** Do you have --

23          **MS. ANDERSON:** We were fixing it for Your Honor.

24          **THE COURT:** Is it already fixed?

25          **MS. ANDERSON:** It's not fixed.

## PROCEEDINGS

1           **THE CLERK:** So here --

2           **MR. MOSS:** It's a markup, Your Honor.

3           **MS. ANDERSON:** There was a numerical typo between 72  
4 and 75. It should just be one number. So down at the bottom  
5 we wrote the correct numerical number.

6           Thank you.

7           **THE CLERK:** And the number is at the bottom of the  
8 page?

9           **MS. ANDERSON:** That's the correct order, yeah. It's  
10 just numerical, the way it should be in that list of exhibits.

11          **MR. RAGLAND:** I think we have the hard copy.

12          **MS. ANDERSON:** We've got success here.

13          **THE COURT:** Have both sides looked at it now?

14          **MS. ANDERSON:** Yes.

15          Thank you very much.

16          **THE COURT:** All right. Let's --

17          **MR. MOSS:** This looks fine, Your Honor.

18          **THE COURT:** Give Dawn one to make part of the record.

19          **MS. ANDERSON:** Okay.

20          **THE COURT:** And then, Dawn, you and Dew take the  
21 little cart, wheel it back to the jury room along with the  
22 other -- are you taking the other note in?

23          **THE CLERK:** Yes.

24          **THE COURT:** Wheel in the computer thing. And that  
25 problem, we hope, is done.

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1           Okay. Anything more right now?

2           **MR. MOSS:** No, Your Honor.

3           **MS. ANDERSON:** I think that's it, Your Honor.

4           **THE COURT:** Please file your briefs by midnight,  
5 because I feel like you're intruding on the prerogatives of the  
6 jury by both agreeing to make them do something that whoever  
7 loses this case is then going to claim they didn't do a good  
8 job because they didn't understand the instructions because you  
9 wouldn't let them take them home at night.

10           I don't know. It just -- it's just not -- I think you're  
11 not being fair to the jury. So you ought to think about this  
12 and let me know by midnight.

13           Here, I'll give you another example. What if under your  
14 proposal there's only one copy of a hard-copy exhibit. So is  
15 one person -- they can't all read it at the same time. Only  
16 one person can read it. What are the others supposed to do in  
17 the meantime? Read another document? Well, if they're all  
18 going to read different documents, they might as well read them  
19 before they start talking.

20           And you can't stop them from thinking about the case as  
21 they're driving home. They'll be thinking about it. Maybe  
22 waking up at 2:00 a.m., like all of you have been doing, and  
23 making a note to yourself. "Oh, this is a good point." You  
24 wouldn't even let them do that.

25           **MS. ANDERSON:** Your Honor, we're only addressing the

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1 three. But we will be happy to look and see if there's  
2 authority on this to bring to the Court's attention as well.

3 **THE COURT:** I think the problem is more profound than  
4 just the three questions that they've asked, because we have to  
5 answer those three questions by reference to what they can do  
6 otherwise. And you should think through a coherent strategy of  
7 what it is that a statutory body like a jury is entitled to do.

8 **MS. ANDERSON:** We will do that, Your Honor.

9 **THE COURT:** For the moment, we told them no. But I  
10 think we should be telling them yes on all three of these  
11 things.

12 Okay. Are we done not for today but for right now?

13 **MS. ANDERSON:** Yes. Thank you, Your Honor.

14 **THE COURT:** All right. Thank you.

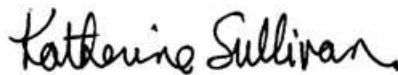
15 (At 12:34 the proceedings were in recess, while jury  
16 deliberations continue.)

17 - - - -

18 **CERTIFICATE OF REPORTER**

19 I certify that the foregoing is a correct transcript  
20 from the record of proceedings in the above-entitled matter.

21 DATE: Tuesday, May 24, 2016

22  
23 

24 Katherine Powell Sullivan, CSR #5812, RMR, CRR  
25 U.S. Court Reporter